PETITION NOT PRINTED

FILED
MAR 29 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 618

AL MAJOR,
Petitioner,

v.

PHILLIPS-JONES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	4
ARGUMENT	10
CONCLUSION	14

Table of Cases

Bova v. *General Mills, Inc.*, 173 F. 2d 138 (C.C.A. 6th 1949) 12

Fishgold v. *Sullivan Dry Dock & Repair Corporation*, 328 U. S. 275 (1946) 11

Houghton v. *Texas State Life Ins. Co.*, 166 F. 2d 848 (C.C.A. 5th 1948), cert. den. 335 U. S. 822 (1948)....10, 11

Levine v. *Berman*, 161 F. 2d 386 (C.C.A. 7th 1947) cert. den. 332 U. S. 792 (1947) 11

Loeb v. *Kivo*, 169 F. 2d 346 (C.C.A. 2nd 1948), cert. den. 335 U. S. 891 (1948) 11, 12

Schreier v. *M. H. Fishman Co.*, 176 F. 2d 722 (C.C.A. 3rd 1948) 12

Schwetzler v. *Midwest Dairy Products Corporation*, 174 F. 2d 612 (C.C.A. 7th 1949) 12

Trusteed Funds, Inc. v. *Dacey*, 160 F. 2d 413 (C.C.A. 1st 1947) 10, 11

Table of Statutes

U. S. Code, Title 50, Sec. 308 ..... 2, 4
28 U.S.C.A., Sec. 1254 2
50 U.S.C.A., Appendix, Sec. 459 2

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is not reported officially but may be found in the Record at page 31. The opinion of the United States Court of Appeals for the Second Circuit is reported at 192 F. 2d 186 (see also R. pp. 322-328).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 1, 1951 (R. p. 329). No petition for rehearing was filed. The petition for a writ

of certiorari was filed on February 28, 1952. The jurisdiction of this Court is invoked by the petitioner under the Judicial Code (28 U.S.C.A., Sec. 1254).

Questions Presented

We believe the following questions are presented on the record:

1. Did the respondent comply with its obligations under the statute when it offered to restore the petitioner to a position of like seniority, status, and pay, and the petitioner advised the respondent in advance that it would be useless to offer him any territory other than his original territory since he would not under any circumstances accept any such other territory, and the petitioner refused to discuss any other territory with the respondent?

2. Was the petitioner's application for reinstatement made in good faith?

Statute Involved

This action was instituted by the petitioner under the Selective Service Act of 1940, as amended, the pertinent provisions from which follow (U. S. Code, Title 50, Sec. 308; see also 50 U.S.C.A., Appendix, Sec. 459):

> "SEC. 308. Service and health certificates; employment and reemployment provisions; voting during service
>
> "(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) * * * shall be entitled

to a certificate to that effect upon the completion of such period of training and service * * *;

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year.

* * * * *

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. * * *"

Statement

This is an action under the Selective Service Act of 1940, as amended, instituted by the petitioner (herein called "plaintiff"), a veteran of World War II, for restoration to his former position as traveling salesman for the respondent (herein called "defendant"), and damages.

The statute provides for the restoration of a veteran who meets certain requirements to the position he held with the employer at the time he entered the service or "to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so" (U. S. Code, Title 50, Sec. 308).

The plaintiff was employed by the defendant, a manufacturer of shirts and other men's furnishings, as a salesman of its products from January 25, 1941 to on or about August 22, 1942, a period of approximately 19 months (R. pp. 55, 56). His employment was pursuant to written contracts and covered the territory consisting of the State of Mississippi, six counties in northern Louisiana and 21 counties in southern Arkansas (Plf's. Exs. Nos. 3-4, R. pp. 257-270). By contract rider, the city of Texarkana (Arkansas-Texas) was added to the plaintiff's territory (R. p. 256). The above contracts, and the contracts covering this territory in May, 1947, specifically provided that the territory designated in the contract was "subject to such revisions with regard thereto as the Employer may deem advisable in its own interest and in its sole discretion, from time to time" (R. pp. 258, 265, 288, 305).

The plaintiff was inducted into the Army of the United States on August 22, 1942 and served until April 26, 1947, when he was honorably discharged (R. pp. 52-54).

Commencing with a letter from the plaintiff to the defendant dated May 12, 1947, and continuing to June 5, 1947, correspondence was had between the plaintiff and the defendant through its executive Vice President, Benjamin Smullyan, with respect to the plaintiff's re-employment. A review of the correspondence follows:

(a) Letter from plaintiff to defendant, dated May 12, 1947 (Plf's. Ex. 7, R. p. 275).

The plaintiff advised the defendant he had been released from the service and asked to be returned to his former territory.

> ("When I was inducted into the service I had the territory covering Mississippi, North Louisiana and South Arkansas. I would like to have this same territory and desire to get started at the earliest possible moment.")

(b) Letter from Smullyan to plaintiff, dated May 20, 1947 (Plf's. Ex. 8, R. pp. 276, 277).

The plaintiff was advised it was the defendant's policy to restore ex-servicemen to their former positions or to like positions and pay, except to the extent that circumstances may have so changed as to make it impossible or unreasonable to do so. Mr. Smullyan stated, "We are confident that we can make appropriate provision for you." He requested the plaintiff to meet him at the Salesmen's Convention in Chicago on June 3, when the plaintiff's re-employment would be discussed, the defendant to pay the plaintiff's traveling expenses to Chicago.

(c) Letter from plaintiff to defendant, dated May 23, 1947 (Plf's. Ex. 9, R. p. 278).

The plaintiff stated he would come to Chicago only with the understanding that he would take over his original territory and none other, it being a needless expenditure of the defendant's money for him to come to Chicago if defendant had any other territory in mind for him.

(d) Letter from Smullyan to plaintiff, dated May 27, 1947 (Plf's. Ex. 10, R. pp. 279, 280).

The plaintiff's demand to be returned to his original territory was replied to as follows:

> "I have your letter of May 23rd in which you state that you would not meet me in Chicago except with the understanding that you were to take over your old territory in Mississippi, North Louisiana and South Arkansas. I can well appreciate your desire to do so but I must point out certain facts that we must take into consideration in this matter.
>
> Since October, 1942—the time that you left—another man has been covering the territory. It is hardly feasible for us, on short notice, to make extensive changes of territory and it is quite unreasonable for us to be expected to do so under these circumstances.
>
> Despite the facts which I shall mention below, we are quite willing to try to work out an appropriate employment and territorial arrangement with you, which we believe should be fully satisfactory for your purpose, and I suggest that you do meet me in any event in Chicago for a discussion.
>
> * * * * *
>
> * * * we are more than willing to make arrangements for you which will be of a fully adequate

nature and which will not require any dislocation of your home and family in Mississippi. Be assured that, within a short time, making proper changes, we can give you a territory so that you could operate from your present home and probably secure an income even better than what you had before.

I will therefore appreciate your writing me upon receipt of this letter that you will come to Chicago so that final arrangements can be made in person between us and so that you can take a place with our sales force."

(e) Telegram from plaintiff to Smullyan, dated May 28, 1947 (Plf's. Ex. 11, R. p. 281).

The plaintiff rejected the foregoing offer and advised the defendant that he would not be interested in any territory other than his original territory, saying:

"REFERENCE YOURS 27TH, AS MUCH AS I WOULD LIKE TO SEE YOU IN PERSON IT WOULD BE USELESS FOR ME TO COME TO CHICAGO UNLESS YOU AGREE TO GIVE ME MY OLD TERRITORY BECAUSE I WOULD NOT BE INTERESTED IN ANY OTHER TERRITORY * * *"

(f) Telegram from Smullyan to plaintiff dated June 2, 1947 (Plf's. Ex. 12, R. p. 282).

The following offer, which would have permitted the plaintiff to operate from his home in Jackson and contained a statement that if the defendant found it "at all feasible" it would return the plaintiff's original territory, was then made to the plaintiff:

"READY TO PLACE YOU IMMEDIATELY ON OUR PAYROLL WITH DRAWING ACCOUNT OF $75.00 PER WEEK AGAINST COMMISSIONS TERRITORY TO BE DETERMINED SHORTLY

AND TO BE AT LEAST IN NEIGHBORHOOD NEAR ENOUGH TO YOUR HOME IN JACKSON TO PERMIT YOUR OPERATION FROM THERE. TERRITORIAL REARRANGEMENTS NOW PLANNED AND INVOLVES CERTAIN DIFFICULTIES WHICH WE WILL WORK OUT SATISFACTORILY AS QUICKLY AS POSSIBLE AND IF WE FIND IT ALL FEASIBLE WILL RETURN YOUR OLD TERRITORY. SUGGEST YOU COME TO NEW YORK DURING WEEK OF JUNE 9TH AT OUR EXPENSE TO COMPLETE DETAILED ARRANGEMENTS IN ACCORDANCE WITH REGULAR EMPLOYMENT PRACTICE."

There never was a refusal to give the plaintiff his original territory except for a short preliminary period. It is also to be noted that the defendant offered to re-employ the plaintiff *immediately* at a $75.00 drawing account compared to the $50.00 drawing account with which the plaintiff was originally provided (R. p. 261).

(g) Telegram from plaintiff to Smullyan, dated June 4, 1947 (Plf's. Ex. 13, R. p. 283).

The plaintiff rejected the above offer stating that he would not accept any territory other than his original territory and that he would meet with Smullyan only with the agreement that he would *immediately* be returned to the original territory.

(h) Telegram from Smullyan to plaintiff, dated June 5, 1947 (Plf's. Ex. 14, R. p. 284).

The plaintiff was advised that the telegram of June 2 contained a full statement of a proper basis for employment.

The foregoing correspondence was the only correspondence between the parties, and there were no oral conversations. At no time did the plaintiff request the defendant

to inform him of the territory it would be willing to grant him, nor did he ever give the defendant an opportunity to so inform him (Findings of Fact No. 3, R. p. 38).

In 1939 the plaintiff was candidate for the office of Treasurer of the State of Mississippi, an election for which office is held every four years. The plaintiff was again a candidate for this office at the following election held in 1943, at which time the plaintiff was in the Armed Forces. On June 5, 1947, the date he received the final telegram from the defendant and the last day which under the law he could file an application to run for this office, he filed such an application and was a candidate for the office in the election held in August, 1947 (Def's. Ex. "A", R. p. 303; R. pp. 88-89, 95-97).

On May 7, 1947, five days before his first letter requesting re-employment, the plaintiff caused a five-acre plot to be subdivided into the so-called "Major Subdivision", a real estate development in which he was engaged in active business (R. p. 100). In 1947 the plaintiff built duplex apartments for rental purposes and rented a piece of property for sub-lease purposes (R. p. 102).

This action, instituted in the District Court of the United States, Southern District of New York, was not commenced until May 12, 1949, a lapse of two years since the correspondence with the defendant. The complaint asked that the plaintiff be restored to his former position and contained no alternative request for restoration to a position of like seniority, status and pay (R. pp. 8-14).

A jury trial was requested by the plaintiff and the case was tried in the presence of an advisory jury. The advisory jury found for the defendant. The trial judge dismissed the complaint and made findings of fact and conclusions of law (R. pp. 35-42). Judgment was entered for defendant, and plaintiff appealed from the judgment

to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the judgment of the District Court.

Argument

1. Petitioner seeks a review by this Court on the ground that the opinion of the court below is in conflict with decisions in certain other circuits and with a decision of this Court. No such conflict exists.

The decision in the court below is alleged to be in conflict with the decisions in *Trusteed Funds, Inc.* v. *Dacey,* 160 F. 2d 413 (C.C.A. 1st 1947), and *Houghton* v. *Texas State Life Ins. Co.,* 166 F. 2d 848 (C.C.A. 5th 1948), cert. den. 335 U. S. 822 (1948). In the *Trusteed Funds* case, the veteran sought to be restored to his former position as well as to be again designated a member of the employer's board of directors. The employer offered the veteran employment in a different city under an arrangement whereby *the veteran would receive less compensation* than if returned to his former position. It was held that this was not an offer to restore the veteran to a position of like seniority, status and pay, as required by the statute. The court stated that a director, as such, was not entitled to reemployment rights under the statute but that where as in the case before it the employer had not complied with its obligations under the statute the fact that the veteran asked for more than he was entitled to was of no legal consequence. The *Trusteed Funds* case in no way conflicts with the decision in the instant case in which the petitioner demanded to be restored to his original territory and refused to accept or even discuss a position of "like seniority, status, and pay" (with a higher drawing account)

which the respondent was entitled to offer the petitioner under the provisions of the statute. In the *Trusteed Funds* case the veteran demanded something to which he was entitled along with something to which he was not entitled, whereas in the instant case the petitioner's entire demand was held to be improper.

In the *Houghton* case, the veteran asked to be restored to his old job as president of the employer, or to a position of like seniority, status and pay. The employer refused to restore the veteran to his old job or to offer him any other job. The court stated that when an employer thinks exact restoration impossible or unreasonable, it is his duty to consider and offer another like position instead of making a "bald refusal". In the instant case the respondent did not make a "bald refusal" and on the contrary offered to restore the veteran to a position of "like seniority, status, and pay", but the petitioner rejected the offer advising the respondent categorically in advance that he would definitely reject any offer of any territory other than his original territory.

There is, of course, no conflict between the decision in the instant case and the decision of this Court in *Fishgold* v. *Sullivan Dry Dock & Repair Corporation*, 328 U. S. 275 (1946). The facts in the two cases are so entirely different as not to permit comparison.

As to the cases cited on page 14 of the petitioner's brief as being in conflict with the instant decision, the court's attention is called to the fact that three of the seven cases cited are District Court cases. Furthermore, *Loeb* v. *Kivo*, 169 F. 2d 346 (C.C.A. 2nd 1948), cert. den. 335 U. S. 891 (1948), is a decision of the Second Circuit, reference to which was made by Judge Hand in his opinion in the instant case. *Levine* v. *Berman*, 161 F. 2d 386 (C.C.A. 7th 1947), cert. den. 332 U. S. 792 (1947), cited

by the petitioner, was also discussed by Judge Hand and shown to be entirely consistent with the instant decision. In any event an examination of these cases reveal that they are decisions in which the positions offered were found not of "like seniority, status, and pay", and consequently the court decided in favor of the veteran. These cases are not in conflict with the decision in the instant case.

For cases in which the court denied the veteran relief under the statute because of his refusal to accept the position offered him, see *Bova* v. *General Mills, Inc.*, 173 F. 2d 138 (C.C.A. 6th 1949) and *Schwetzler* v. *Midwest Dairy Products Corporation*, 174 F. 2d 612 (C.C.A. 7th 1949).

2. Petitioner further argues that this Court should accept jurisdiction over the instant case on the ground that it raises important questions of waiver and estoppel and that the doctrine concerning the same is in confusion in the second circuit and open in the third circuit. These contentions are untrue. In both *Loeb* v. *Kivo, supra*, and *Schreier* v. *M. H. Fishman Co.*, 176 F. 2d 722 (C.C.A. 3rd 1948), cited by the petitioner in support of his argument, the veteran accepted a position with the employer inferior to his old position and subsequently sued under the statute seeking restoration to his old position. In each case the employer contended that having accepted the position which he did, the veteran waived his rights under the statute. This contention was rejected by the court in the *Loeb* case on the ground that the veteran was induced to accept the inferior position by untrue statements made by the employer. The same contention was also rejected by the court in the *Schreier* case on the ground that the veteran accepted the inferior position

with the expectation that the employer would give him a position equivalent to his old one as soon as possible. In the instant case no such analogy exists. Here the petitioner refused to discuss, no less accept, any territory other than his original territory. Both the District Court and the Court of Appeals held that under the circumstances the respondent had complied with its obligations under the statute.

3. In the court below, the petitioner, faced with his refusal to accept any territory other than that which he had at the time he entered the service, argued that he was as a matter of law entitled to be restored to his former territory. Judge Hand properly rejected this contention, pointing out that under the statute an employer has an alternative right to offer a veteran a position of "like seniority, status, and pay". Petitioner has now apparently abandoned this argument and attempts to inject into the case questions of waiver and estoppel and seeks to find a conflict in the cases. However, the instant case raises no such questions nor is there any conflict existing in the cases cited. This is simply a case where the employer, in good faith, and within his rights under the statute, offered to restore the veteran to a position of "like seniority, status, and pay" and agreed to return the petitioner to his old territory if it was "at all feasible". The petitioner repeatedly stated that he would not accept any territory other than his original territory and would not discuss any other territory with the respondent. Under these circumstances, the trial Judge properly stated: "It seems to me that the defendant did all that was reasonable in the way of an attempt to afford plaintiff the opportunity to rehabilitate himself in the work he was engaged in at the time he entered the service" (R. p. 34).

Similarly, Judge Hand held (R. pp. 326-327):

> "* * * But while it is true that the defendant never precisely set forth the territory which it was willing to assign to the plaintiff, it was given no opportunity to do this for the plaintiff repeatedly refused to consider any other territory than that which he had originally held and thus put himself outside any alternative assignment which, for the reasons we have given, the defendant was entitled to make, provided it would afford equal seniority, status, and pay. Furthermore, on June 2, 1947, the defendant offered to put the plaintiff on the payroll at a larger drawing account than he had had before he entered military service and also to give him a territory convenient to his home. In short the defendant sought no more than an opportunity to talk over conditions with other salesmen whose rights might be affected by the defendant's assignments of territory. This seems to us to have been a reasonable suggestion which should not have been met by flat refusals on the part of the plaintiff to discuss the situation at all."

The trial court also found that the petitioner's application for reinstatement had not been made in good faith.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial questions warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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